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Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

RONALD CECIL, PATRICK HADDIX, ODUS HAYES,
Petitioners,
VS.
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts committed reversible error, and violated petitioners' rights guaranteed by the Sixth Amendment, by excluding all testimony, cross-examination and argument relating to the mental condition of the government's key — indeed, sole — witness against the petitioner?

2. Whether the court below erred in affirming the trial court's ruling that a defendant must establish a *prima facie* case of a violation of the fair cross-section requirement of the Jury Selection Service Act of 1968 (28 U.S.C. Sections 1861, *et seq.*) and the Sixth Amendment to the Constitution as a prerequisite to disclosure under 28 U.S.C. Section 1867(f) of records and papers used in the jury selection process?

3. Whether substantial underrepresentation of distinctive groups on grand or petit jury venires incident to the government's reliance upon voter registration lists as its exclusive source for composing juries may constitute "systematic exclusion", thus violating the fair cross-section requirement of the Jury Selection Service Act of 1968 (28 U.S.C. Sections 1861, *et. seq.*) and the Sixth Amendment to the Constitution?

4. Whether the Court of Appeals abused its power to rehear cases *en banc* and violated petitioners' right to due process of law guaranteed by the Fifth Amendment, by *sua sponte* ordering a rehearing *en banc* (over the dissent of two members of the original panel) before the original panel's opinion — which was likely to favor appellant — had even been published, in a manner contrary to the Circuit's own Local Rules and the Federal Rules of Appellate Procedure?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those named in the caption to this petition.

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REFERENCE TO OFFICIAL REPORTS

The opinion of the Court of Appeals filed on January 11, 1988, is published at 836 F.2d 1431. A copy of that opinion is attached to this petition as Appendix A. The opinion of the United States District Court for the District of Maryland, granting the Government's motion *in limine,* was rendered from the bench and is set out in Appendix B. The pertinent portions of the District Court's order denying defendants' "Motion to Strike All Jury Lists, Including Venire of Grand Jurors, Dismiss Indictment, and for Orders Regarding Records In Connection With the Jury Selection Process" is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1988. On February 5, 1988, the United States Court of Appeals for the Fourth Circuit denied the petition for rehearing. Jurisdiction of this Court is invoked under

the provisions of Section 1254 (1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Amendment VI, Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

In all criminal prosecutions, the accused shall enjoy the right . . . to a trial by an impartial jury of the state.

B. Jury Selection Service Act of 1968.

28 U.S.C. Section 1861, *et seq.* (The pertinent provisions are set out in Appendix D).

C. Federal Rules of Appellate Procedure, Rules 35, 47. (The pertinent provisions are set out in Appendix E.)

STATEMENT OF THE CASE

On November 25, 1981, an indictment was filed charging 22 named-defendants and other unindicted co-defendants with participation in a scheme to import and distribute approximately 36,000 pounds of hashish into the United States. On May 26, 1982, in a superseding indictment, defendants/petitioners Ronald Cecil, Odus Hayes, and Patrick Haddix, among others, were charged with the following offenses: (1) conspiracy to import into the United States and to possess with intent to distribute in excess of 1,000 pounds of marijuana in the form of hashish, a Schedule I non-narcotic controlled substance, in violation of 21 U.S.C. Section 952(a), 842(a)(1) and (b)(6) (Count 1); (2) importation of marijuana in the form of hashish, in violation of 21 U.S.C. Section 952(a) and aiding and abetting, in violation of 18 U.S.C. Section 2 (Counts 2, 3 and 4); and (3) possession with intent to distribute marijuana in the form of hashish, in violation of 21 U.S.C. Section 841(a)(1), and aiding and abetting, in violation of 18 U.S.C. Section 2 (Count 5). The case went to trial on March 16, 1983, before the Honorable Norman P. Ramsey, United States District Judge and a jury. On March 30,

1983, the jury found petitioners Patrick Haddix and Odus Hayes guilty on all Counts. Petitioner Ronald Cecil was found not guilty on Counts 1-4 and guilty as to Count 5.

The government's key witness against petitioner Cecil was Richard Creswell, a habitual drug user and career criminal, who agreed to plead guilty to a lesser charge in exchange for his testimony in this case. He alone testified as to petitioner Cecil's involvement in the smuggling operation.

During the course of investigations, defense counsel learned that Creswell had jumped bail in 1977 from a narcotics charge he was then facing in the Eastern District of New York. Creswell was apprehended in 1980, and returned to New York to face multiple charges. In 1981, Creswell, the government's star witness in the instant case, filed a notice, under F. R. Crim. P. 12.2, of his intention to raise an insanity defense at his upcoming trial.

In June of 1981, Creswell was examined by a reputable New Jersey psychiatrist, who concluded that the witness was legally insane, had developed "fantasies," had experienced "memory losses," and had a disorder which resulted in "the expectation of special favors in taking advantage of others."[1] Following this psychiatric examination, Creswell

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[1]The psychiatrist examined Creswell for a total of four hours. His conclusions must be accepted as true and read in the light most favorable to the defense, since they were kept from the jury. *Davis v. Alaska,* 415 U.S. 308, 317-18 (1974). The psychiatrist's report of 1981 was highly relevant to Creswell's credibility in relation to the events about which he was testifying at trial, concluding that the witness' mental condition included "vagueness of recall," and "spotty" memory losses. Indeed, defense counsel submitted an offer of proof in the form of a current certification, prepared by the psychiatrist who had examined the witness in 1981, who stated, under penalty of perjury:

> . . . It is my further opinion that the facts and conclusions set out in Exhibit A [the report] and those hereinafter stated would exist today assuming the absence of any psychiatric therapy and/or

entered into a plea agreement under which he pleaded guilty to certain specified charges.

After discovering this information in the public file, petitioner Cecil's counsel disclosed it to the government. The government then filed a written motion *in limine* to preclude cross-examination based on this episode and any material in the psychiatric report. Defense counsel made clear that several legitimate and important grounds of relevance existed for introducing the facts surrounding the psychiatric evaluation, either by way of cross-examination or a current psychiatric evaluation. First, counsel observed that if Creswell was indeed suffering from the condition diagnosed by the psychiatrist, he was incapable of telling the truth. Moreover, even if Creswell was not insane in 1981, but rather, was malingering in order to "beat the rap," the jury could reasonably find that he was now motivated to lie in order to "beat the rap" once again.

Although these pathologies were of obvious relevance to Creswell's credibility as a witness to events that had allegedly taken place in 1980, and although defense counsel committed themselves to spending a total of "no more

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> counseling by Mr. Creswell from the date of my examination to this date.
>
> It is understood that Mr. Creswell has been offered certain benefits to testify as a witness. The benefits offered would provide temptation to any man; however, conscience structure would intercede and preclude someone with a normal personality pattern from distorting the truth. A witness, from a psychiatric viewpoint, must observe clearly, remember fully, and be able to testify without suppressing or distorting the truth. Mr. Creswell's personality disorder precludes him from providing truthful testimony, in all medical probability, given the circumstances at hand.
>
> At the time of my examination, it was quite clear that he would do anything to manipulate the judicial process for purely selfish reasons.

The full text of the psychiartists report and the certification are set out in Appendix F.

than 3 minutes" on this issue, the trial judge granted the government's motion to prevent petitioner from cross-examining or presenting any evidence regarding the existence of a mental condition which prevented Creswell from telling the truth. The trial court also excluded proffered testimony from the psychiatrist who had examined Creswell, and refused defense counsel's request for a new psychiatric examination of the witness. Finally, the trial court ruled that no mention of this entire psychiatric episode could be made by the defense during the trial and closing argument.

Prior to trial, defendants/petitioners moved to strike all jury lists, including the venire of grand jurors, and to dismiss the indictment on the basis that the composition of jury lists in the District of Maryland violated the Sixth Amendment to the United States Constitution and the Jury Selection Service Act of 1968, 28 U.S.C. Section 1861, *et seq.* (hereafter "the Act"). The motion was based, in part, on a declaration from petitioner Cecil's attorney indicating that jury lists in the District of Maryland are selected only from the voter registration lists in the state of Maryland and not from any other source. The declaration further indicated that the voter registration list eliminates almost 40% of the otherwise eligible population and substantially underrepresents Blacks and persons aged 18-34. Additionally, the declaration contained assertions that supplementation of the voter registration lists with the list of Maryland residents licensed to drive would yield 90.51% representation, while only costing the state about $10,000.00 per year.

Defendants/petitioners also moved, pursuant to Section 1867 (f) of the Act, for an order granting access to papers and records used in connection with the jury selection process, in order to flesh-out the factual assertions contained in their declarations and motions. The District Court denied the motion for production of the records and papers on the ground that defendant's motion papers failed to establish a *prima facie* case of a violation of the

fair cross-section requirement of the Act and the Constitution, and that this was a prerequisite to disclosure under Section 1867 (f) of the Act. The District Court also denied on the merits the motion to dismiss the indictments, holding that defendant's moving papers conclusively demonstrated that they could not prove a *prima facie* case of a violation of the Act under *Duren v. Missouri,* 439 U.S. 357, 364 (1979).

On appeal, a divided Fourth Circuit, sitting *en banc,* upheld both rulings of the District Court, despite the government's concession that the District Court erred in denying the disclosure motion.

In addition to the substantive issues raised in this petition, an important question exists concerning the propriety of the *en banc* procedures applied by the Fourth Circuit in this case. This appeal was first argued on May 5, 1986, to a randomly selected panel of three judges from the circuit. As is obvious from listening to the tape of the oral argument, appellant "won" his case before that panel by a vote of 2-1. Dissatisfied with that result, the "dissenting" judge apparently initiated, *sua sponte,* a request for rehearing *en banc.* Appellant was given no notice of this maneuver, nor given an opportunity to contest it either on the merits or on the grounds of procedural impropriety. On January 28, 1987, before a decision was rendered, the Fourth Circuit ordered *sua sponte,* rehearing — over the dissent of two members of the original panel who were apparently prepared to rule for appellant. Additionally, two other judges on the circuit also dissented. The court, sitting *en banc* affirmed the petitioner's convictions, with three judges dissenting. A petition for rehearing was summarily denied by the Fourth Circuit, *en banc,* with four judges dissenting.

REASONS FOR GRANTING THE WRIT

I

THE LOWER COURTS COMMITTED REVERSIBLE ERROR BY EXCLUDING ALL TESTIMONY, CROSS-EXAMINATION AND ARGUMENT RELATING TO THE MENTAL CONDITION OF THE GOVERNMENT'S KEY WITNESS.

A. The Lower Courts Committed Reversible Error By Restricting the Petitioner's Right to Cross-Examine the Government's Key Witness Against Him.

As the dissent in the lower court opinion observed, "[i]t is hard to imagine evidence — other than directly exculpating evidence — more critical to a criminal defendant's defense than evidence that a key witness against him is not credible on the matters in issue because of a mental impairment affecting his powers of recall or general reliability." *United States v. Cecil,* 836 F.2d at 1456 (dissenting opinion). Petitioner contends that the trial court improperly placed limitations on defense questioning of the government's chief witness relating to his prior psychiatric condition.

The Sixth Amendment mandates that a criminal defendant has the right to be "confronted with the witnesses against him." This Court has repeatedly emphasized that "a primary interest secured by [the confrontation clause] is the right of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 315 (1974), *quoting, Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Ohio v. Roberts,* 448 U.S. 56, 63 (1980). The right of cross-examination "is an essential safeguard of fact-finding accuracy in a adversary system of justice and 'the principle means by which the believability of a witness and the truth of his testimony are tested.'" *United States v. Lindstrom,* 698 F.2d 1154, 1160 (11th Cir. 1983), *quoting, Davis v. Alaska,* 415 U.S. at 316.

While the scope and extent of cross-examination are generally within the sound discretion of the trial court,

(*Davis v. Alaska,* 415 U.S. at 316) courts have noted that wide latitude should be allowed when a government witness in a criminal case is being cross-examined by the defendant. *United States v. Pedroza,* 750 F.2d 187, 195 (2d Cir. 1984). Further, the trial judge's discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Gordon v. United States,* 344 U.S. 414, 423 (1953). Circuit Courts have repeatedly held that the trial court's "discretionary authority . . . comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Lindstrom,* 698 F.2d at 1160, *quoting, Greene v. Wainwright,* 634 F.2d 272, 275 (5th Cir. 1981).

Moreover, where the testimony of a witness is *critical* to the government's case — where the witness is, in essence, the government's "star" witness — courts have consistently held that the defendant must be permitted even greater flexibility to attack the witness' credibility through wide-ranging cross-examination. *See, United States v. Morales-Quinones,* 812 F.2d 604, 613 (10th Cir. 1987); *United States v. Lindstrom,* 698 F.2d at 1163; *United States v. Dennis,* 625 F.2d 782, 798 (8th Cir. 1980); *United States v. Summers,* 598 F.2d 450, 460 (5th Cir. 1979). As one court recently noted, "[c]ross-examination of a government 'star' witness is important . . . and a presumption favors free cross-examination on possible bias, motive, ability to precede and remember, and general character for truthfulness." *United States v. Phelps,* 733 F.2d 1464, 1472 (11th Cir. 1984) (citations omitted).

Petitioner contends that the trial judge and the Court of Appeals, committed reversible error in preventing the jury from hearing testimony or any cross-examination about Creswell's psychiatric condition. As the Court in *United States v. Partin,* 493 F.2d 750, 762 (5th Cir. 1974) *cert. denied,* 434 U.S. 903 (1977) noted, "it is just as reasonable for the jury to be informed of a witness' mental incapacity

at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know and correctly relate the truth." *Id.* Courts have frequently noted that "the fact of insanity or mental abnormality either at the time of observing the facts which he reports in his testimony, or at the time of testifying, may be provable, on cross- examination or by extrinsic evidence." *Sinclair v. Turner,* 447 F.2d 1158, 1162 (10th Cir.), *cert. denied,* 405 U.S. 1048 (1972).

While trial judges undoubtedly have broad discretion to limit cross-examination and the introduction of evidence, where the witness is central to the government's case, courts have virtually uniformly held that restrictions on the defendant's right to present evidence concerning relevant mental instability exceed any possible trial court discretion. *See, e.g., United States v. Lindstrom, supra; Greene v. Wainright, supra; United States v. Society of Independent Gasoline Marketers,* 624 F.2d 461 (4th Cir. 1979) (criminal conviction reversed where defendant denied access to hospital records of major government witness indicating that witness had been under treatment for mental illness during alleged conspiracy) *cert. denied sub nom. Amerada Hess Corp. v. United States,* 449 U.S. 1078 (1981)[2] *United States v. Partin, supra.*

As the dissent in the court below noted, "any evidence significantly probative of this particular witness' lack of credibility was absolutely critical here." *United States v. Cecil,* 836 F.2d at 1457 (dissenting opinion). While the district court's discretion to exclude evidence pursuant to Federal Rules of Evidence, Rule 403, is wide, "with liberty at stake on the credibility of a single, indisputably crimi-

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[2]The court noted that it could "think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight." *Id,* 624 F.2d at 469.

nal, obviously erratic and self-interested witness," *(United States v. Cecil*, 836 F.2d at 1457 (dissenting opinion), such discretion was clearly abused in the instant case by not permitting the petitioner the limited proof he sought to introduce on this critical matter. The trial judge's decision to restrict any inquiry into the government's "star" witness' well documented mental condition violated the defendant's Sixth Amendment right to confront and cross-examine witnesses.

B. The Court of Appeals Misinterpreted Precedent, and Mischaracterized the Trial Record, in Affirming the Decision of the Trial Court to Exclude all Testimony, Cross-Examination and Argument Relating to the Mental Condition of the Government's Key Witness.

The court below asserted that, in affirming the district court's decision to exclude all testimony, cross-examination and argument relating to the mental condition of the government's key witness, it was complying with the standards established by the Fourth Circuit in *United States v. Lopez*, 611 F.2d 44 (4th Cir. 1979). In *Lopez*, the court, emphasizing concern with the prejudice to the *witness*, stated that "the witness' mental impairment to constitute a proper subject for cross-examination, must have been at a time probatively related to the time period about which he was attempting to testify, must go to the witness' qualification to testify and ability to recall, and must not introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the government to introduce testimony explaining the matter." *Lopez*, 611 F.2d at 46.[3] In order to allow a trial court to determine

[3]While it is true that *Lopez* requires certain preliminary standards to be met before presenting the issue of a witness' mental impairment to the jury, the case does not stand for the proposition that under appropriate circumstances (as where the probative value of the testimony outweighs undue prejudice) this evidence should not be admitted. Rather, the standards are meant as safeguards established to avoid embarrassment and distress to a witness. The main concerns

whether such cross-examination or testimony is admissible, a party must make an offer of proof of the evidence it seeks to develop on the witness' mental impairment. *Id.*[4]

While *Lopez* announces the correct rule of law, the facts of that case are clearly distinguishable from those presented in the instant petition. In *Lopez*, the Fourth Circuit affirmed the trial judge's refusal to permit the defendant to cross-examine a witness concerning a psychiatric examination performed on him. The court, in holding that the trial court did not abuse its discretion, observed that the defendant had "pointed to nothing either in the record of the witness' psychiatric examination nor elsewhere that would show an incapacity on the witness' part to have observed the event to which his testimony related, or to recall that event sufficiently to testify accurately at trial." *Id.* at 47. Here, by contrast, the petitioner demonstrated, by the psychiatrist's certification, that the witness was shown to have incapacity which existed *during the time*

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enunciated in *Lopez* must be balanced against the need for defense counsel to pursue the defendant's constitutional right to impeach the witness. In the interests of fairness, the *Lopez* analysis must provide not only a shield for the witness, but also a sword for the defense to use for impeachment purposes. A fair reading of *Lopez* in conjunction with Federal Rules of Evidence 403 would require such a balancing of the competing interests, especially in the circumstances of this case where a conviction could not have been obtained *but for* the testimony of this critical witness.

[4]The offer of proof made by the petitioner during trial clearly satisfied the standards set out in *Lopez*. Defense counsel presented to the district judge both the psychiatric report and a certification signed by the psychiatrist who examined the witness at length. According to the psychiatrist, the witness' mental impairment existed during the spring and summer of 1980 — the time period about which Creswell testified at trial. The certification also observed that the witness' condition "would exist today [March 1983] assuming the absence of any psychiatric therapy and/or counseling." Further, the psychiatrist specifically stated that Creswell's mental impairment prevented him from testifying truthfully, and led him to "do anything to manipulate the judicial process for purely selfish reasons."

of the events about which he testified. Similarly, in *Lopez*, the defendant did not seek to introduce into the record the psychiatric examination; here, by contrast, the defendant did. Finally, and importantly, there was no indication, in *Lopez,* that the witness the defendant sought to cross-examine was critical to the government's case; here, by contrast, Creswell was the *only* government witness who testified against the petitioner. Indeed, as the dissent in the court below noted, any evidence "significantly probative of this particular witness' lack of credibility was absolutely critical here." *United States v. Cecil*, 836 F.2d at 1457 (dissenting opinion).

In affirming the decision of the lower court, the majority, in a number of critical respects, simply misread the trial record. The court, for instance, insinuates that defense counsel belatedly waited until well after the trial had begun before raising the abmissibility of the evidence which it intended to use against Creswell. *Id.* at 1458 (dissenting opinion). This assertion overlooks the undisputed material fact that it was the Government, through its efforts to prevent the evidence from coming in against Creswell, which raised the issue in its motion *in limine.* The trial court's ruling was not precipitated by a belated effort by the petitioner to get the evidence in, "but by the government to keep it out." *Id.* The critical information — that Creswell had given official notice in 1981 of his intention to enter an insanity plea and had undergone psychiatric evaluation to support his plea — was discovered by defense counsel, and communicated to the government, well in advance of the government's use of Creswell as a witness. As the dissent notes with justifiable incredulity, "[i]t defies belief, and the government does not represent, that it only became aware at mid-point of trial that Creswell might be cross-examined on the point." *Id.* There is absolutely no support in the record for the majority's insinuation that *defense* counsel was dilatory in presenting the Rule 12.2 notice to the government; on the contrary, it was the Government which kept this information from defense counsel, and which, though it must have

long known that defense counsel intended to cross-examine Creswell on this issue, waited until just before it put Creswell on the stand to raise its *in limine* motion.

Similarly in error is the majority's assertion that the trial court's exclusionary ruling was limited to two documentary items. *Id.* at 1438. By a series of rulings, the trial court excluded any and all evidence concerning Creswell's psychiatric condition and his motion in 1981. As the dissent notes, "the process of exclusion was an evolving one, over the two-day period devoted to the government's motion, but its ultimate scope and its effect was unmistakeably total exclusion," including an exclusion of all opportunity to conduct any cross-examination on the point. *See, Id.* at 1458-1460 (dissenting opinion). Similarly, the concern reflected in the majority's decision that introduction of evidence would have caused an undue delay is unsupported by the record. Indeed, defense counsel addressed this concern at trial by indicating the limited use, in both time and scope, that would be made of the evidence if it were allowed to be presented.

The majority opinion suggests that any error which may have been committed by the trial court was harmless. *See, Id.* at 1442-43. The appropriate test for harmlessness of error in the exclusion of this evidence is whether the court can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).[5]

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[5] *See, also, Davis v. Alaska, supra,* in which this court wrote:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided "a crucial link in the proof . . . of petitioner's act. . . ." The accuracy and truthfulness of the witness' testimony were key

Where, as here, the government's *entire* case against the petitioner revolved around the testimony of a *single* witness, and the trial court deprived the defendant of a critical opportunity to impeach the witness, it cannot be said with any assurance that the error was harmless. As the dissent notes, the trial court "deprived the defendant of a legitimate opportunity to impeach the sole witness against him by cross-examination on a point that might well have swayed the jury's judgment." *United States v. Cecil,* 836 U.S. at 1460 (dissenting opinion).

This Court should grant Certoriari to remedy the lower court's clear misinterpretation of precedent, and mischaracterization of the trial court record, in affirming the trial court's decision to exclude all testimony, cross-examination and argument relating to the mental condition of the government's key witness against Cecil. Petitioner had indisputable evidence, which was properly proffered to the court, that indicated that the principal — indeed, sole — government witness who testified against him had, within the past two years, asserted, officially and publicly, that during the time period about which he was testifying, he had been mentally impaired — so impaired, he had argued, that he himself should be relieved of criminal liability in a separate matter. The District Court's ruling, and the lower court's affirmance, effectively deprived petitioner of the opportunity to present any of this critically important impeachment evidence before the jury.

> elements in the state's case against petitioner . . . On these facts it seems to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right to effective cross-examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' "

Id. (citations omitted).

II

THE DECISION BELOW AFFIRMING THE DISTRICT COURT'S HOLDING THAT A DEFENDANT MUST ESTABLISH A *PRIMA FACIE* CASE OF A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT OF THE ACT AND THE CONSTITUTION AS A PREREQUISITE, UNDER SECTION 1867 (f) OF THE ACT, TO DISCLOSURE OF PAPERS AND RECORDS USED IN THE JURY SELECTION PROCESS IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Decision of the Court Below is in Direct Conflict With this Court's Ruling in *Test v. United States*, 420 U.S. 28 (1975).

In *Test v. United States, supra,* at 30, this Court held that Section 1867 (f) of the Act "makes clear that a litigant [challenging jury-selection procedures] has essentially an *unqualified* right to inspect jury lists." *Id.* The Court reasoned that this "unqualified right is required under the 'plain text' of the statute, as well as 'the statute's overall purpose of insuring grand and petit juries selected at random from a fair cross-section of the community.' " *Id. quoting* 28 U.S.C. Section 1861; *See also, United States v. Alden,* 776 F.2d 771 (8th Cir. 1985); *United States v. Lawson,* 670 F.2d 923, 930 (9th Cir. 1982); *United States v. Marcano-Garcia,* 622 F.2d 12, 18 (1st Cir. 1980).

Here, the court below, in affirming the district court's denial of defendants' motion to inspect the records used in the jury-selection process, determined that the facts contained in the declaration submitted by the defendant in support of their motions were not sufficient to support the invalidation of the exclusive use of voter registration lists as a basis for evolving master jury lists. Therefore, the court concluded that defendants were not entitled to have access to the papers and records used in the jury selection process. The court based this finding, both on its assumption that the alleged underrepresentation was not a result

of "systematic exclusion," and, on its dissatisfaction with the data relied upon by defendants in support of the motion.

Despite the fact that the court's ruling directly contradicts this court's clear pronouncement in *Test v. United States, supra,* an equally startling aspect of this ruling is that the court, in a complete abandonment of judicial neutrality, argued, based on data discovered on its own and of which it took judicial notice, that the voter registration list did not impermissibly underrepresent certain groups. The court in essence found its data superior to that contained in the defendant's affidavit, and thus, upheld the district court's order denying defendant's motion.

The problem with the court's approach is twofold. First, the data it relied upon has never been subject to adversarial scrutiny. Second, the data relied upon by the court contains only voter registration lists percentages, not data showing the ultimate composition of master jury lists and venires that the Act allows defendants to discover as a basis for potential challenges. 28 U.S.C. Section 1867(f). The court, however, mistakenly assumed that the two lists will always conform to one another. More important, the court failed to recognize that the determination of whether the fair cross-section requirement has been violated is properly made by the district court upon hearing the evidence presented by the parties, not by an appellate court relying on its own unchallenged judicially noticed data.

This Court is urged to grant review to settle the direct conflict between the decision in this case and this Court's holding in *Test v. United States, supra,* which is virtually indistinguishable, in its relevant aspects, from the instant case. Further, the Court should review this case to provide guidance to lower courts and litigants faced with fair cross-section challenges pursuant to the Act.

B. The Decision of the Court Below Thwarts the Express Intent of Congress by Denying Defendants Their "Unqualified Right" to Inspect and Copy Relevant Records Pursuant to Section 1867 (f) of the Act.

The court below expressed fear that approval of defendants claim "would put in jeopardy the operation of criminal trials in this circuit . . ." because similar challenges would be made in subsequent trials causing "delay and confusion, wasting in most instances judicial time and making a mockery of orderly judicial procedure." *United States v. Cecil,* 836 U.S. at 1454-55.

Not only are these fears largely unwarranted, the court below relied on them to remove the teeth from the Act by denying petitioners/defendants the opportunity to ensure, through the procedures outlined in Section 1867 of the Act, that voter registration lists were truly providing a fair cross-section of jurors as guaranteed by the Act. Congress was well aware that voter registration lists may not always provide a fair cross-section. Therefore, they included in the Act a means for challenging the composition of master jury lists and a provision for supplementing inadequate voter registration lists. Absent a finding that the Act is unconstitutional, it is not the province of the Fourth Circuit to override Congress' express intent based on concerns of efficient judicial administration. Further, effective management of records and the principles of *stare decisis* at the district court level can quickly forestall nonmeritorius claims brought pursuant to the Act.

The decision of the Fourth Circuit is clearly out of line with the decisions of this Court and the majority of the federal circuits, and contravenes the express intent of Congress. This Court should grant review to squarely delineate the procedures mandated by the Act and to ensure that they are complied with. Moreover, the writ should issue and the case should ultimately be remanded to the district court so that petitioners/defendants may have the opportunity to flesh out and brief their assertion that sole reliance on the voter registration lists in the

District of Maryland violates the fair cross-section requirement of the Act and the Sixth Amendment to the Constitution.

III

EXCLUSIVE RELIANCE ON VOTER REGISTRATION LISTS FOR JURY SELECTION PURPOSES MAY VIOLATE THE FAIR CROSS-SECTION REQUIREMENT OF THE ACT AND THE CONSTITUTION WHEN DISTINCTIVE GROUPS ARE SUBSTANTIALLY UNDERREPRESENTED ON MASTER JURY LISTS FOR REASONS INHERENT IN THE SELECTION PROCESS.

A. The Legislative History of the Act and This Court's Decision in *Duren v. Missouri*, 439 U.S. 357 (1979) Both Indicate that Underrepresentation of Cognizable Groups Resulting from Exclusive Reliance on Voter Registration Lists May Violate the Act and the Constitution Even In the Absence of Intentional Discrimination.

The majority of the Fourth Circuit held that exclusive reliance upon voter registration lists is per se compliance with the fair cross-section requirement as long as no intentional discrimination is shown in composing either voter or jury lists. The court relied, for the most part, on a series of lower court decisions decided prior to this Court's decision in *Duren v. Missouri*, 439 U.S. 357 (1979), which held that "to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Id.*

The critical question in this case, as evidenced by the split in the majority and dissenting opinions in the court below is whether, under *Duren,* the fair cross-section requirement only protects against intentional discrimination in the jury selection process, or, stated in other words, whether "systematic exclusion" may be found where substantial underrepresentation results from self-exclusion by members of distinctive groups when that self-exclusion is inherent in a challenged process.

The court below relied on a line of cases beginning with *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969), to conclude that statutory and constitutional fair cross-section requirements are satisfied if persons belonging to cognizable groups are excluded from jury service due solely to their own inaction. This analysis fails to recognize one of two policies the Act seeks to implement — that all litigants "should have the right to grand and petit juries selected at random from a fair cross-section of the community." 28 U.S.C. Section 1861. Instead, the *Camp* line of cases is based on the other policy fostered by the Act — that "all citizens shall have the opportunity to be considered for jury service." *Id.*

While recognizing the latter policy, the *Camp* line of decisions, as well as the decision of the Fourth Circuit in this case, fail to recognize the right of a criminal defendant to be charged and tried by jurors randomly chosen from a fair cross section of the community.

This policy is evidenced in portions of the Act's legislative history which focused on the policy of securing the rights of criminal defendants to be tried by a jury chosen from a fair cross-section of the population as opposed to the public's right to serve as jurors. The legislative history notes that voting lists "need not perfectly mirror the percentage structure of the community," but:

> Any substantial percentage deviations must be corrected by the use of supplemental sources [H.R. Rep. No. 1076, at 1794.]

* * *

> Jury performance will be enhanced as well by closer approximation of the fair cross-sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result — biased in the sense that they reflect a slanted view of the community they are supposed to represent. [*Id.* at 1797.]

* * *

> [I]n accord with Section 1963 (b) (2), voter lists will be supplemented by other sources of names if they do not reflect a community cross-section. [*Id.* at 1798.]

* * *

> [M]oreover, *the bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the Act, by reason of local voting practices. Where that is true, the plan must proscribe other sources to supplement the voter lists.* [*Id.* at 1799 (emphasis added).]

The legislative history of the Act demonstrates a congressional intent that underrepresentation of cognizable groups resulting from exclusive reliance on voter registration lists may violate the Act even where the underrepresentation is traceable to self-exclusion by failure of the underrepresented groups to register to vote.

Further, *Duren*, in its analysis of the Sixth Amendment fair cross-section right, supports this premise. In *Duren*, this Court dealt with the effect of underrepresentation of women on jury lists resulting from their self-exclusion under a state law exemption privilege. The court found that exclusion by this process was "systematic" and in turn violated the fair cross-section requirement. *Duren, supra*,

at 366. Thus, under *Duren*, it would appear that any process of jury selection where master jury lists and venires are produced in which "distinctive" groups are substantially underrepresented, for reasons "inherent" in the procedure used to generate the list, violates the Act and the Sixth Amendment. *Id* at 366.[6]

Additionally, as the dissent in the court below noted, *Duren* distinguishes between the equal protection rights of citizens to serve on juries and a criminal defendant's Sixth Amendment fair cross-section right. *United States v. Cecil*, 836 F.2d 1464 (dissenting opinion). The *Duren* court noted that while the equal protection right is protected against intentional discrimination, the defendant's right is violated by "systematic disproportion itself." *Duren, supra*, at 368 n. 26. The decision in *Duren*, therefore, places in question the validity of the *Camp* line of cases relied on by the Fourth Circuit.[7]

The decisions of the Federal Circuits demonstrate a conflict as to whether "systematic exclusion" can only

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[6]The court below attempts to distinguish *Duren* by noting that in *Duren*, the self-exclusion took place at the jury selection stage, rather than the voter registration stage as in this case. This distinction, however, is not useful because where the governmental process used is one in which the voter registration list is the same as the master jury list, as in this case, self-exclusion from one results in self-exclusion from the other.

[7]The court below also relied on three recent First Circuit cases in support of its decision. (*See, United States v. Lynch*, 792 F.2d 269 (1st Cir. 1986); *Amaya v. Hansen*, 781 F.2d 1 (1st Cir. 1986); *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (en banc)). However, the court misinterpreted these cases as supporting its position. To the contrary, however, these cases recognize that if a group is intrinsically distinct (e.g. racial minorities), a simple showing of significant statistical underrepresentation without regard to cause, is prima facie proof that the fair cross-section requirement of the Act and Sixth Amendment has been violated. *Barber*, 772 F.2d at 998; *Amaya*, 781 F.2d at 7. This misapplication of precedent further evidences the court's confusion in interpreting the Act and the applicable case law.

result from "intentional discrimination." The *Camp* line of cases and the decision in the court below support the position that, absent intentional discrimination, underrepresentation on jury lists due to underrepresentation on voter registration lists can only be attributed to the free choice of those who have not registered. Therefore, these groups cannot be considered "cognizable" under the Act or the Constitution. *See, United States v. Evans,* 542 F.2d 805, 812 (10th Cir. 1976); *United States v. Freeman,* 514 F.2d 171, 173 (8th Cir. 1975); *United States v., Lewis,* 472 F.2d 252, 255-56 (3d Cir. 1973); *United States v. Guzman,* 468 F.2d 1245, 1248 (2d Cir. 1972); *United States v. Ross,* 468 F.2d 1213, 1216 (9th Cir. 1972).

However, a large number of other federal courts have analyzed claims of underrepresentation traceable to sole reliance on voter registration lists without according presumptive validity to exclusive reliance on voter registration lists. *See, e.g., United States v. Pepe,* 747 F.2d 632, 648-49(11th Cir. 1984); *United States v. Jenkins,* 496 F.2d 57, 64-66 (2d Cir. 1974); *Waller v. Butkovich,* 593 F.Supp. 942, 948-58 (M.D.N.C. 1984); *United States v. Armsbury,* 408 F.Supp. 1130, 1139-40 (D. Or. 1976) (expressly rejecting *Camp rationale)*; *United States v. McDaniels,* 370 F.Supp. 298, 301-12 (E.D.La. 1973) (same), *aff'd sub nom. United States v. Goff,* 509 F.2d 825 (5th Cir. 1975).

This Court should grant review to provide guidance to the lower courts interpreting the Act after *Duren* and to secure uniformity throughout the circuits. Specifically, the Court needs to make clear what constitutes "systematic exclusion" under the third prong of *Duren,* and whether sole reliance on voter registration lists will always pass muster under the Constitution absent intentional discrimination in composing either voter or jury lists. The law in regard to the Act is confused and inconsistent and is in need of an authoritative ruling by this Court.

IV

THE COURT OF APPEALS ABUSED ITS POWER TO REHEAR CASES *EN BANC*, OFFENDED THE SPIRIT OF *EN BANC* PROCEEDINGS, AND VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW BY INITIATING THE INSTANT *EN BANC* REHEARING *SUA SPONTE*, BEFORE THE ORIGINAL PANEL'S DECISION HAD EVEN BEEN RENDERED, AND IN A MANNER CONTRARY TO ITS LOCAL RULES

A. While There is a Split in the Local Rules of the Circuits as to the Propriety of *Sua Sponte* Initiation of *En Banc* Review, the Local Rules of the Fourth Circuit Do Not Provide for Judicial Initiation of *En Banc* Review.

It is well recognized that *en banc* rehearing is an exceptional procedure, appropriate only when an unusual and important issue of law is involved. Rule 35 of the Federal Rules of Appellate Procedure specifically provides that the courts of appeals should reserve these *en banc* procedures for extraordinary circumstances, directing that "[s]uch a hearing or rehearing is not favored," and should not be ordered except when "necessary to secure or maintain uniformity" of the circuit's decisions, or when "the proceeding involves a question of exceptional importance." F.R.App. P. 35(a). This Court has noted that "[e]n banc courts are the exception, not the rule." *United States v. American-Foreign Steamship Co.*, 363 U.S. 685, 689 (1960).

The power to rehear cases *en banc* — especially *sua sponte* — is subject to grave abuse. The spirit of *en banc* review is clearly violated when the reason for ordering such a rehearing is simply dissatisfaction with the alignment and makeup of the original panel — where in other words, the purpose of employing this extraordinary procedure is to engage in "judicial judge shopping" or to further

political objectives.[8] The purpose of *en banc* rehearings is not to provide a vehicle by which a member of the court, dissatisfied with the outcome of a particular case, may simply realign the votes and change the result. As Justice Jackson long ago noted, "[r]ehearings en banc are not appropriate where the effect is simply to interpose another review by an enlarged court of appeals between decision by a conventional three-judge court and petition to this Court. Delay, cost, and uncertainty, which take their toll of both the successful and unsuccessful litigant, are each increased by an additional appeal to a hybrid intermediate court." *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).

Rather, as this Court has observed, *en banc* rehearings are to be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged to the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Co.*, 363 U.S. at 689. Similarly, in *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 626 (1974), this Court noted, with approval, "the wise use of this exceptional power to determine major doctrinal trends of the future for a particular circuit." *Id.*

Petitioner does not argue that the Federal Courts of Appeals are devoid of authority to initiate *en banc* hearings

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[8] *See, e.g., Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 915 (4th Cir. 1983) (Phillips, J., dissenting) *cert. denied* 464 U.S. 1040 (1984) in which Judge Phillips of the Fourth Circuit, observed:

> [F]ormer Chief Judge Kaufman has expressed the general view that a "judge should [not] cast a vote for reconsideration by the entire court merely because he disagrees with the result reached by the Panel . . . Rule 35 was not adopted to provide that luxury." This bespeaks a general perception, with which I certainly agree, that it is not the intended function of the en banc procedure simply to provide in effect another intermediate appellate court to review for "mere" panel error.

Id., (citations omitted).

sua sponte. Indeed, in *Western Pacific R. Corp. v. Western Pacific R. Co., supra,* this Court observed, in *dicta* that such hearings were permissible. *See also,* Notes of Advisory Committee on Appellate Rules following F. R. App. P. 35 (1979). Circuits may provide, by court rule, for *sua sponte* initiation; however, "[i]t is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice — whatever it may be — whereby the court convenes itself *en banc.*" *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. at 260-261. Petitioner contends that the *sua sponte* decision of the Fourth Circuit to rehear this case *en banc* constituted a clear violation of its local rules, and a gross abuse of the *en banc* procedure.

The Federal Rules of Appellate Procedure do not provide for the initiation of *en banc* hearings *sua sponte.*[9] While the "procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing is to be ordered . . . is largely to be left to intramural determination by each of the Courts of Appeals," *United States v. American-Foreign S.S. Corp.,* 363 U.S. at 688 (1960), the Courts of Appeals are certainly not free to ignore those procedures once established. *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. at 260-261. The instant petition raises an important question, left open in *Western Pacific:* whether a court of appeals, in the absence of a court rule providing for *sua sponte* initiation, may order an *en banc* review without the request of a party. Judge Friendly, in *United States v. New York, New Haven & Hartford R. Co.,* 276 F.2d 525, 553, n. 1 (2nd Cir.) (Friendly, J., joined by Lumbard, J., concurring in denial of rehearing *en banc*), *cert. denied* 362 U.S. 961 (1960), expressed strong doubts as to whether the Circuit had such

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[9]As noted in the commentary following the Rule, Rule 35 *specifically* "does not effect the power of a court of appeals to initiate *en banc* hearings *sua sponte.*" Notes of Advisory Committee on Appellate Rules, Rule 35. Rule 35(B), for instance, provides only for suggestion by a *party* for hearing or rehearing *en banc.*

authority, relying, in part, on the teachings of *Western Pacific.*

Circuits are split, in their local rules, over judicial initiation of *en banc* review. The Fourth Circuit, however, in clear contravention to its conduct in the instant case, specifically does not provide for *sua sponte* initiation in its local rules. Rather, Rule 35 of the Fourth Circuit Local Rules provides only for suggestion for rehearing *en banc* by a party, requiring that the suggestion be made "at the same time, and in the same document as the petition for rehearing." 4th Cir. Local R. 35(a).

Not only are the Court of Appeals evenly split on the advisability of judicial initiation of *en banc* review, but the circuits, themselves, are internally torn as to their authority to initiate such review. In *United States v. Samuels,* 808 F.2d 1298 (8th Cir. 1987), the Eighth Circuit, which has a provision in its local rules for *sua sponte* initiation, denied a request of an active judge for a rehearing *en banc.* In a separate statement, the Chief Judge of the Circuit decried the practice of *sua sponte* rehearing. Challenging the very authority of the circuit to promulgate rules which provided for judicial requests for *en banc* review, the Chief Judge suggested that such rules might be violative of Fed. R. App. P. 47. *Id.* at 1299 (Lay, C. J., separate statement). Moreover, the Chief Judge questioned:

> . . . The propriety and advisability of a rule allowing judges *sua sponte* to seek rehearing *en banc.* We have enough work to do without assuming an activist role and becoming advocates.

Id.

Indeed, in a footnote, the Chief Judge observed that over the past twenty years, he was "not aware of any decision of the panel of this court being reheard *en banc* where only a judge has requested a rehearing *en banc* and a party has not so requested it. This historical lesson weighs heavily against the advisability of such a rule." *Id.* at 1300 n. 2.

The question of whether the Circuits may, in accordance with Fed. R. App. P. 35 and 47, provide for *sua sponte* initiation of *en banc* review is an issue of immediate concern to litigants and to the Court of Appeals — as demonstrated in *United States v. Samuels, supra,* it is an issue which divides the circuits themselves.[10] The instant case presents an even more compelling question for this Court to resolve, since the Fourth Circuit, by its local rules, does *not* provide for *sua sponte* initiation of *en banc* rehearings. Indeed, the local rules provide absolutely no procedural protection or notice to litigants regarding such conduct.

Certiorari should be granted to resolve a conflict among the Circuits as to the authority and propriety of members of the court to initiate *en banc* rehearings, particularly where, as in this case, the local rules do not provide for judicial initiation of *en banc* rehearings.

B. The Decision of the Circuit *Sua Sponte* to Rehear the Instant Matter *En Banc*, Before the Decision was even Rendered By the Original Panel, Violates the Spirit of *En Banc* Review.

En banc review is an extraordinary procedure; in the instant case, however, it was also imposed on both parties in an extraordinary manner. *En banc's* are not to be favored, "should be rarely necessary, and should be ordered only when consideration by the full court is necessary to secure or maintain uniformity of . . . decision or when the proceeding involves a question of exceptional importance." *See,* Fed. R. App. P. 35. *United States v. Samuels*, 808 F.2d at 1300 (Lay, C.J., separate statement). Where a case presents neither, *en banc* review is clearly unwarranted. *Id.* Without question, "*en banc* rehearings

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[10]In *Samuels,* the Eighth Circuit was evenly split as to the propriety of granting the judge's request for a rehearing *en banc*; the decision not to grant the request provoked four separate statements by the members of the court.

are never justified because of the makeup of the panels." *Id.*

Moreover, *sua sponte* initiation of *en banc* rehearings runs counter to the Department of Justice's clearly articulated policy of careful and considered evaluation of all *en banc* requests. The Solicitor General is entrusted with authority, under the United States Code, to argue appeals for the United States, 28 U.S.C. Sections 505, 518 (1982), and, pursuant to federal regulations, shall "(b) determine whether, and to what extent, appeals will be taken by the government to all appellate courts . . . including petitions for rehearing *en banc* . . ." 28 C.F.R. O.20, Part O — Organization of the Department of Justice, Sub-part D — Office of the Solicitor General. As an indication of the extraordinary importance which the Department attaches to governmental review of all *en banc* petitions, the Department of Justice mandates, in its United States Attorneys Manual, that "prior authorization . . . must be obtained for the filing of a suggestion for a rehearing *en banc* in a court of appeals."[11] U.S.A.M. 2-2.120(B)(1/1984). *Sua sponte* initiation of *en banc* rehearing is clearly at odds with this legitimate governmental interest in deciding which cases the government wishes to seek this extraordinary review.

A policy of *sua sponte* intitation of *en banc* rehearings, which totally ignores the interest of the parties and fails to comport with the dictates of Fed. R. App. P. 35(a), is violative of the spirit and purpose of *en banc* review. Further, where, as in this case, the issues on appeal are fact sensitive — concerning how the trial record is to be read — the decision of the court to rehear this case *en banc* evinces a policy of crass judicial judge shopping, is indicative of a procedure which is disrespectful of the role of the Solicitor General, and constitutes an abuse of the exceptional procedure of *en banc* rehearings.

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[11]Prior authorization is not required for a petition for rehearing by the same panel which heard the case. U.S.A.M. 2-2.120(B)(1/1984).

Above all, the decision of the Fourth Circuit to *sua sponte* rehear the instant appeal *en banc* gives the clear appearance of judicial impropriety — an appearance which is exacerbated by the fact that two of the judges who dissented in the *en banc* appeal were members of the original, randomly selected panel. Petitioner suggests that, contrary to the well-recognized purpose of this extraordinary procedure, the instant *en banc* opinion appears to "simply substitute . . . the judgment of a . . . majority of the . . . *en banc* court for that of a one-vote majority of a three-member panel on purely judgmental questions." *Arnold v. Eastern Airlines, Inc.*, 712 F.2d at 917 (Phillips, J., dissenting). Certainly, the conduct of the Fourth Circuit does not reflect upon a "provident use of heavily pressed judicial resources." *Id.* But more fundamentally, the instant *sua sponte* initiation of *en banc* review calls into question "the very essence of judicial neutrality." *United States v. Samuels*, 808 F.2d 1298, 1300 (Lay, C.J., separate statement). As Judge Phillips of the Fourth Circuit recently noted in dissent, the "raw power" obviously exists in the larger majority to simply substitute its judgment for every decision of a three-judge panel within the circuit; as this petition poses to this Court "the real question is the propriety of the powers exercised in this or other cases of the general type." *Arnold v. Eastern Airlines, Inc.*, 712 F.2d at 917 (Phillips, J., dissenting).

Certiorari should be granted in this case to decide whether the circuit below contravened the spirit and purpose of *en banc* rehearings, abused its power to rehear cases, and violated both its local rules and the Federal Rules of Appellate Procedure in deciding, *sua sponte,* to rehear the instant case *en banc.*

CONCLUSION

For all the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on January 11, 1988.

DATED: March 25, 1988.

Respectfully submitted,

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Gerson S. Horn, Esq.**
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Attorneys for Petitioner
Ronald Cecil

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** Lead Counsel

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9665 Wilshire Blvd., Suite 450, Beverly Hills, California.

On March 25, 1988, I served the within Petition for Writ of Certiorari in re: "United States of America vs. Ronald Cecil" in the United States Supreme Court, October Term 1987, No. .....; Appendix filed under separate cover,

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California:

Clerk, United States Supreme Court
#1 First Street N.E.
Washington D.C. 20543
(40 and orig. Federal Express)

Solicitor General
Department of Justice,
Washington, D.C. 20503

Catherine C. Blake,
United States Attorney
and J. Sedwick Sollers, III
A.U.S.A., and John G. Douglass A.U.S.A
820 United States Court House
101 Lombard Street
Baltimore, MD 21201

All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on March 25, 1988, at Los Angeles, California.

_____

RITA SARNO

Subscribed and Sworn to before me this day of , 1988.

My Commission Expires _____.

_____

Notary Public